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Giving the Fourth Amendment Meaning: Creating an Adversarial Warrant Proceeding to Protect From Unreasonable Searches and Seizures

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GIVING THE FOURTH AMENDMENT MEANING: CREATING AN ADVERSARIAL WARRANT PROCEEDING TO PROTECT FROM UNREASONABLE SEARCHES AND SEIZURES

Ben Mordechai-Strongin*

ABSTRACT

For at least the past 40 years, police and prosecutors have had free reign in conducting illegal searches and seizures nominally barred by the Fourth Amendment. The breadth of exceptions to the warrant requirement, the lax interpretation of probable cause, and especially the “good faith” doctrine announced in U.S. v. Leon have led to severe violations of privacy rights, trauma to those wrongly searched or seized, and a court system overburdened by police misconduct cases. Most scholars analyzing the issue agree that the rights guaranteed by the Fourth Amendment—to be free from unreasonable search and seizure—have been severely eroded or even eviscerated by the Supreme Court. Some suggest that in order to revitalize the Fourth Amendment, the United States should make it easier to secure civil damages after Fourth Amendment rights have been violated. Others have argued that the United States must guarantee stronger ex ante protections to uphold fundamental privacy rights before they are violated.

This Note argues that, while warrant requirements do need to be more stringent to safeguard Fourth Amendment rights, warrant requirements cannot on their own sufficiently protect such a sacred right. This Note proposes the adoption of adversarial warrant proceedings, designed to ensure police and prosecutors meet their probable cause burden and to ensure that any lies or sloppy investigative work are rooted out from a warrant application before a warrant is granted. False searches and arrests can be deeply traumatizing and have excruciating and long-term impacts. For the Fourth Amendment to have any meaningful affect, the People must have an advocate—a Warrants Counsel—fighting for their right to be free from unreasonable searches before that right is violated.

The Roberts Court’s destruction of the Fourth Amendment leaves little reason to expect protection from unreasonable search and seizure through litigation. Instead, Congress must create the Warrants Counsel program legislatively. Congress should look to the major success of the Federal Defenders program as a blueprint for zealous advocacy and protection of rights. A Warrants Counsel, like a public defender, would be a government-paid attorney, present to argue against probable cause before a magistrate whenever police or prosecutors seek a warrant. Like the Sixth Amendment before the public defender system, the Fourth Amendment desperately needs some structure to give its

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language meaning; the Warrants Counsel system would counterbalance over-powered police and prosecutors in favor of the People.

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BACKGROUND

On January 9, 2020, Robert Williams, a Black man living in a Detroit suburb, was arrested in his driveway in front of his wife and two young daughters. His arrest stemmed from a warrant, obtained more than six months prior, on what his attorneys argue was less than probable cause.¹ Months before Robert was forced into handcuffs, a newly appointed Detroit Police Department (DPD) detective was assigned to investigate the theft of several watches from a Shinola store and given a near-empty case file. The file contained one six-pack photo array and the results of a facial recognition technology (FRT) search which was conducted using a grainy screenshot of surveillance footage from the Shinola store.² The results indicated Robert Williams was the likely cul-

1. See generally, Proposed First Amended Complaint, *Williams v. City of Detroit, et al.* (No. 21-cv-10827) (E.D. Mich. Apr. 25, 2023).

2. *Id.* at ¶¶ 1-15. FRT is a technology gaining popularity in police departments across the US through which investigators can plug in an input photo of an unknown suspect and a computer algorithm can compare that photo to a database of known individuals (such as a database driver's

prit of the theft, based on a picture of Mr. Williams from a six-year-old driver's license photo. The FRT results were returned to the detective on a piece of paper with the words "[THIS] IS **AN INVESTIGATIVE LEAD ONLY AND IS NOT PROBABLE CAUSE TO ARREST.**"³

The detective then contacted Shinola and requested their assistance in solving the crime. The store employees were uninterested in helping but offered the assistance of their Inventory and Loss Prevention consultants. A consultant, who had done nothing more than view the surveillance video footage of the theft, identified Mr. Williams in a photo lineup.⁴

Armed with the facial recognition result and a non-eyewitness identification, the DPD detective submitted a request for a warrant, which was summarily granted. The warrant application displayed the low-quality input photo used to conduct the search, a pixelated image of a Black man in a hat from a downward camera angle.⁵ The application did not mention that low quality images, taken from a poor angle, in which a subject is wearing a hat are much less reliable. Nor did the warrant mention that FRT fares even worse when identifying Black faces. The warrant application also failed to mention that the witness who positively identified Mr. Williams did not see the alleged theft in person.⁶ But the magistrate tasked with approving the warrant request did not know any of this.

A magistrate, of course, cannot be expected to know the intricacies of FRT, and the magistrate who approved this warrant application (or any warrant application like it), Mr. Williams's attorneys alleged, should not have been expected to know a thing about FRT.⁷ But had someone been in that courtroom to argue against the prosecutor seeking the arrest warrant, perhaps Mr. Williams would not have suffered the shame or trauma incident to being arrested in front of his children, wife, and neighbors. Had someone noted that conducting an FRT search from the photo used by the DPD was an egregious, erroneous use of the technology; or highlighted the sole witness's non-eyewitness status, Mr. Williams might never have been wrongly seized.

license photos) to potentially identify the unknown suspect. Many activists argue it is unreliable. See generally Street Level Surveillance: Face Recognition, ELEC. FRONTIER FOUND. (Oct. 24, 2017) <https://www.eff.org/pages/face-recognition#:~:text=Face%20recognition%20systems%20ouse%20computer,in%20a%20face%20recognition%20database> [https://perma.cc/ZAB4-FCHU].

3. Proposed First Amended Complaint at ¶¶ 78-80, *Williams*.

4. *Id.* ¶¶ 88-98.

5. *Id.* ¶¶ 99-122.

6. *Id.*

7. *Id.* at ¶¶ 99-122, 298.

Had the warrant proceeding that preceded Mr. Williams's arrest been adversarial, perhaps he would never have spent thirty hours in jail without his medication, been forced to hire a lawyer for his defense, missed several days of work, or spent his forty-second birthday in jail. Perhaps his daughters would not have gone to school and told their friends their dad was arrested and perhaps his eldest daughter would not have felt compelled to try to catch the actual culprit in an effort to ensure her dad was never wrongly arrested again.⁸

In some ways, Mr. Williams was lucky. The mistake in his case was caught fairly early. For many Americans, an arrest based on a bad warrant can mean weeks in jail or wrongful convictions. To live up to the guarantees of the Fourth Amendment's freedom from unreasonable search or seizure, the United States must invest in ensuring that warrants are only issued when probable cause actually exists. In this Note, I argue that an adversarial warrant proceeding can do just that.⁹

INTRODUCTION

Among the most sacred rights in the United States are privacy, bodily autonomy, protection of personal property, and freedom from the arbitrary exercise of the powers of the State against the individual.¹⁰ The Fourth Amendment to the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

8. Indeed, Mr. Williams's oldest daughter once launched her own investigation and was able to quickly prove that her dad looked nothing like the suspect. DPD could take a lesson from her investigative ability.

9. Thank you to Robert Williams and his wife, Melissa, who let me share their story, which in large part inspired this Note.

10. Privacy and bodily autonomy rights recently took a significant blow in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). However, the privacy rights mentioned throughout this Note are derived directly from the Fourth Amendment, not substantive due process. Compare *Katz v. United States*, 389 U.S. 347 (1967) (establishing a standard for Fourth Amendment privacy based in what a person seeks to preserve from being known publicly) with *Roe v. Wade*, 410 U.S. 113 (1973) (detailing a right to privacy from state intrusion into the highly personal decisions and life of a person based in the Fourteenth Amendment). Thus, while still endangered, these narrower rights have not been as brutalized by this Supreme Court as other forms of the right to privacy.

describing the place to be searched, and the persons or things to be seized.¹¹

In just two clauses—the Warrant Clause and the Reasonableness Clause—the Fourth Amendment promises broad and extraordinary protections to the People.¹² And yet, those promises have mostly become vacuous. The clauses themselves do not speak to how people's right to be secure in their persons and effects shall be protected, nor do they speak to when warrants must be sought or describe probable cause,¹³ nor do they provide any remedies for when their guarantees have been violated.¹⁴

Instead, it has been left to the courts to determine what, exactly, the Fourth Amendment protects. And the Supreme Court has found that while Fourth Amendment protections are broad, when the tenets of their promise have been violated, little remedy can be found. At best, Fourth Amendment violations are kept in check by the exclusionary rule, which results in nothing more than suppressing illegally obtained evidence during trial.¹⁵ But even the exclusionary rule has been decimated by countless exceptions; which have ever-expanded the police's ability to breach individual privacy so long as the police act in good faith, are mistaken in their understanding of the law, would have discovered the evidence without the privacy violation, or found the evidence in a manner too attenuated from the violation.¹⁶ Even more limit-

11. U.S. CONST. amend. IV.

12. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 17–18 (1997) (noting the “sheer size” of Fourth and Fifth Amendment law).

13. The Fourth Amendment is “[f]amously short on specifics.” David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000). The Fourth Amendment has largely been defined by Supreme Court gloss, which is often contradictory and is currently undergoing a striking reformation. See *id.* at 1762–70.

14. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 881–83 (1991).

15. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (wrongfully seized documents’ “use upon the trial” was “prejudicial error. . . . What remedies the defendant may have against [police who seized the items] we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials.”). See also *id.* at 392–93 (“the duty of giving [the Fourth Amendment] force . . . is obligatory upon all entrusted [sic] under our Federal system with the enforcement of the laws If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”); *Mapp v. Ohio*, 367 U.S. 643 (1961).

16. Melanie Schoenfeld, *Constitutional Amnesia: Judicial Validation of Probable Cause for Arresting the Wrong Person on a Facially Valid Warrant*, 79 WASH. U. L. Q. 1227, 1227–28 (2001) (quoting Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 749 (1999)) (“The authentic history shows that framing-era doctrine provided a much stronger notion of a ‘right to be secure’ in person and house than does modern doctrine.”). For a list of cases providing exceptions to the

ing, the exclusionary rule applies only at criminal trial. Little remedy is provided to those the state wrongfully searches or arrests but does not prosecute, or to those who are prosecuted but plead guilty instead of going to trial.¹⁷

Warrants have become meaningless pieces of paper that police rarely need.¹⁸ Obtaining a warrant requires very little of investigators seeking to prove probable cause.¹⁹ If a warrant is granted, it remains legitimate so long as the investigator did not intentionally mislead the magistrate who granted the warrant—even if the investigator failed to meet the *de minimus* burden of proving probable cause.²⁰

Clearly, Fourth Amendment jurisprudence is “an embarrassment.”²¹ In response, reformers have been split into two camps. Some advocate for ex post solutions: awarding damages intended to make individuals whole after their rights have been violated. The other camp argues for ex ante solutions: tightening warrant requirements intended to prevent rights from being violated in the first place.

The myriad dangers of a wrongfully granted warrant are severe. Searches and seizures are immensely invasive—which is why the Fourth Amendment exists in the first place. Searches and seizures can lead to public shame, financial problems, deleterious effects on one’s community standing, racial hostility, physical and mental anguish, and loss of government benefits.²² The criminal-legal system, and policing in particular, was designed to embody the idea that Black people were subservient to white people.²³ What’s worse, by blessing police officers with power to

warrant requirement, see ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE, 88 A.L.R. 348.

17. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1626–34 (2012).

18. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994) (“Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so.”).

19. See Bar-Gill & Friedman, *supra* note 17, at 1654–55.

20. *United States v. Leon*, 468 U.S. 897, 957 (1984) (Brennan, J., dissenting) (“Moreover, the good-faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant . . . all police conduct pursuant to that warrant will be protected from further judicial review.”) (internal quotation and citation omitted).

21. Amar, *supra* note 18, at 757–58 (the result of the Supreme Court confusion on the Fourth Amendment “is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.”).

22. See discussion *infra* Section I.

23. Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020) <https://www.washingtonpost.com/graphics/2020/opinions>

enforce “legitimate violence,” officers’ individual biases become the state’s, further enshrining the structural racism of the police force through individual (intentional or otherwise) racism.²⁴ Further, “[a]s the front line of law enforcement, police officers have extraordinary power to shape the individual makeup of the criminal justice system.”²⁵ Thus, in addition to the structural racism inherent in their roles, an individual officer’s implicit and explicit biases are fundamental in the criminal-legal system. The serious nature of legitimizing violence and creating state enforcers must be balanced with as many checks on their power as possible.

Because there is little to ensure ex post solutions are carried out due to the near-absolute power of police, *and* to bolster ex ante solutions to prevent violation of rights in the first place, this Note proposes a new ex ante solution: a legislatively created “Warrants Counsel” (WC) to be present during all warrant proceedings. The WC would act as an adversary to the police officer or prosecutor seeking a warrant in exactly the same way a public defender does at trial—with the sole exception that the suspect would not know they are being defended.²⁶ The process would lead to greater diligence: when police request a warrant, the WC would require the officer to provide more exhaustive warrant applications, including details regarding what their investigations did *not* turn up—not just inculpatory evidence furthering probable cause. The WC position must be full-time and well-funded to ensure police do not act in bad faith in their warrant applications and to ensure that magistrates do not become rubber stamps for the police.

Of course, a WC cannot represent specific individuals the way a public defender would. Thus, this is not an expansion of the Sixth Amendment. Otherwise, police would be required to inform an individual that a warrant was being sought for their arrest or property.²⁷ Rather, the WC

/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/9NNC-8VV7] (“The modern criminal justice system helped preserve racial order — it kept black people in their place.”).

24. See, e.g., Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 172–74 (2020).

25. *Id.* at 174.

26. Out-of-custody warrants are typically obtained without alerting a suspect to the fact that a warrant has been sought for their search or arrest. This need not change under a WC system. See *infra*, Sec. IV.

27. The Sixth Amendment applies only where the accused is present. See *United States v. Ash*, 413 U.S. 300, 317 (1973). Because critics might fear destruction of evidence or flight if a suspect were alerted to a warrant application against them, the WC is a better option than attorney representation. This way, a citizen can have their rights defended without being aware of the potential need to flee. Further, a WC can defend unknown individuals. Arrest warrants are sometimes for unnamed individuals and search warrants may be sought for locations with unknown owners. The unidentified should not waive their rights because of their anonymity. This concept is not new to

system is protective of the Fourth Amendment: instead of providing a right to counsel, it guarantees the right to be free from unreasonable search and seizure. An advocate for a citizen that is not that persons' defense counsel is not novel; in fact, non-counsel defense lawyers have already been endorsed by the Supreme Court to protect the public from police misconduct and to shield against a dangerous abuse of police power against an accused during live line-ups.²⁸

This Note proposes and explains the need for an adversarial warrant proceeding along with heightened warrant requirements. Part I provides greater detail about the need for an adversarial warrant proceeding, highlighting the failures of current warrant proceedings (some inherent and some exacerbated by recent Supreme Court precedent). Part II provides a blueprint to actualize this theoretical proposal by detailing what an adversarial warrant proceeding would look like in practice. Part III explains the need for the legislature to create this protection because the Supreme Court, at least for now, cannot and will not. Part IV acknowledges the unique nature of this proposal and dismisses anticipated counterarguments.

I. THE NEED FOR AN ADVERSARIAL WARRANT PROCEEDING

Much ink has been spilled debating whether more stringent *ex ante* warrant requirements or *ex post* monetary damages and other penalties are a better means of deterring Fourth Amendment violations.²⁹ While this Note adds another voice in support of *ex ante* protections, it adds a new theory of *ex ante* protections to the discussion. Until now, no scholarship has proposed an adversarial *ex ante* warrant procedure. Yet for warrants to comply with the collective Fourth Amendment right protections, adversarial proceedings are the most effective way to deter illegal searches and seizures.

constitutional law—the Supreme Court has upheld a First Amendment right to anonymity in a host of decisions. *See, e.g.*, *Watkins v. United States*, 354 U.S. 178 (1957); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963); *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002).

28. *See United States v. Wade*, 388 U.S. 218, 229–32, 236–39 (1967) (requiring an attorney—but not defendant's attorney—to be present at post-indictment corporeal lineup to prevent “improper influence” and “abuse”); *See also Miranda v. Arizona*, 384 U.S. 436, 535 (1966) (White, J., dissenting) (proposing an “observer” be present at custodial interrogations to ensure a confession was not obtained coercively).

29. *See, e.g.*, Amar, *supra* note 18, at 757 (1994) (utilizing an economic theory of the law to suggest monetary damages are the best remedy to Fourth Amendment violations); Bar-Gill & Friedman, *supra* note 17, at 1609 (2012) (arguing for stronger warrant protections to ensure harms never befall individuals in the first place).

We will never know how many wrongful searches and seizures occur annually because many Fourth Amendment violations go nowhere—they do not result in prosecution, nor do the victims of these violations seek redress.³⁰ When police cross Fourth Amendment boundaries, lay citizens may not even realize their rights were violated. From *Terry* stops (which do not require probable cause),³¹ to the dozens of other warrantless searches and seizures police are able to perform (ideally with probable cause), police barely need warrants to search and seize.³²

To the extent police do seek warrants, magistrates have essentially become rubber stamps, providing a warrant to any officer who seeks one except in the most egregious of cases.³³ Magistrates are not and cannot be the stopgap the legal system expects them to be.³⁴ Some may be too close to police to be neutral or detached, or some may miss the mark given how quickly they review warrant requests.³⁵ A 1984 study found that magistrates spend an average of just two minutes and 48 seconds on each search warrant application presented to them.³⁶

In 1984, the Supreme Court held in *U.S. v. Leon* that when, despite lacking probable cause, an officer acts in good faith upon a warrant erroneously granted by a judge, evidence seized as a result of that Fourth Amendment violation is admissible in a defendant's trial.³⁷ A cursory search of caselaw since *Leon* reveals that it has been cited favorably in federal courts 7,884 times.³⁸ This number suggests thousands of likely

30. See IJ's Project on the 4th Amendment: Protecting Our Right to be Secure in Our Persons and Property, INST. FOR JUST., <https://ij.org/issues/ijcs-project-on-the-4th-amendment/> (last accessed Aug. 16, 2022) [<https://perma.cc/5294-FBK7>].

31. *Terry v. Ohio*, 392 U.S. 1, 24–27 (1968) (legalizing stop and frisk searches based on reasonable suspicion—a standard less than probable cause).

32. Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 543–48 (1997).

33. See generally Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34, nn.63–64 (1988).

34. See generally Robert M. Bloom, *United States v. Leon and Its Ramifications*, 56 U. COLO. L. REV. 247, 254 (1985) (“The National Center of State Courts, however, has found that ‘often officers [are] able, by ‘judge shopping,’ to avoid submitting a request for a warrant to a judge known to be particularly demanding.”); see also Drey Cooley, *Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v. Gates and Advocating De Novo Review for a Magistrate’s Determination of Probable Cause in Applications for Search Warrants*, 55 DRAKE L. REV. 85, 110–11 (2006).

35. See RICHARD VAN DUIZEND, L. PAUL SUTTON, & CHARLOTTE A. CARTER-YAMUCHI., NAT’L CENTER FOR STATE CTS., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 47–49 (ed. 1985).

36. *Id.* at 26; see also *id.* at 73 (“There may be a negative side to the presumed legitimacy of a warrant and the resulting lack of challenges, however, if . . . the initial scrutiny by the magistrate is not as probing as the creation of just such a presumption would seem to require.”).

37. *United States v. Leon*, 468 U.S. 897 (1984).

38. This number was calculated by reviewing the Westlaw page for *US v. Leon*, 468 U.S. 897 (1984), navigating to the tab “Citing References,” selecting “Cases” from the drop-down menu, and

violations of the Fourth Amendment in which the warrant system failed to protect individuals' Fourth Amendment liberties. Indeed, the number represents the tip of the iceberg, providing insight only into cases that went to trial, not those wrongful arrests or searches—like Mr. Williams's—that never resulted in a trial. What's more, fewer and fewer defense attorneys seek to challenge a deficient warrant because *Leon* has become cemented as the law of the land.³⁹ Therefore, deficient warrants cause an unfathomable number of Fourth Amendment violations.

Among the founding tenets of the common law is the notion that it is better for ten guilty persons to go free than for a single innocent to suffer.⁴⁰ The Founders sought to encapsulate this notion throughout the Constitution, particularly in the Fourth, Fifth, and Sixth amendments.⁴¹ Many of the flaws in the U.S. criminal trial system that prevent this country from living up to this lofty ideal have been identified and well discussed.⁴² Yet a deeper problem exists outside of trial and punishment that is only now becoming plain to most Americans: police investigations are just as problematic, have fewer legal checks, and hold nearly as serious long-term consequences as a harsh sentence or faulty trial.⁴³ It is clear that in order to adhere to our most fundamental beliefs such as the right to privacy and bodily autonomy, we must create a system that protects citizens from Fourth Amendment violations *before*—not *after*—their rights have been violated. Magistrates often get it wrong—and it's not surprising.⁴⁴ Magistrates work with the same police officers day after day, week after week.⁴⁵ Eventually, some magistrates

modifying the lefthand search filters to include "Jurisdiction: Federal" and "Treatment Status: Hide Negative."

39. Bloom, *supra* note 34, at 250–51; *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting) (limits on the exclusionary rule "could stop dead in its tracks judicial development of Fourth Amendment rights."); William J. Stuntz, *supra* note 14, at 887–88 (explaining why "suppression hearings, though common, are not featured in every criminal case, and also ... why so many suppression motions are filed but voluntarily dismissed.").

40. See 2 WILLIAM BLACKSTONE, COMMENTARIES, 358 (1765).

41. See discussion *infra*, Section IV.A.

42. See, e.g., Lonita Baker & Robert Grey, Jr., *Liberty and Justice . . . for All? Confronting Systemic Racism and Addressing Civil Unrest – A Call to Action for Young Lawyers*, A.B.A. (July 8, 2020), https://www.americanbar.org/groups/young_lawyers/resources/webinars/liberty-and-justice-for-all-confronting-systemic-racism/ [<https://perma.cc/U3YS-TAUS>].

43. See, e.g., David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1231–32 (2005).

44. See e.g., THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> [perma.cc/9MYX-ZKYQ] (last visited Apr. 19, 2022). Thousands of murder convicts have been exonerated just since 1989. How many wrongfully incarcerated individuals who are not murderers and who have not received the blessing of a dedicated legal team working on exoneration, who have been adjudged not only by probable cause standards, but beyond a reasonable doubt of having convicted a crime, are there wrongly?

45. See VAN DUIZEND ET AL., *supra* note 35, at 36, 94–102.

develop reputations for becoming especially lax in their probable cause determinations.⁴⁶ Even those that maintain an atmosphere of rigor in their warrant hearings can come to trust certain police officers and be less diligent in their determinations.⁴⁷ More, magistrates are fallible and may make mistakes if not presented with contradictory evidence. All of this leads to the immense harms of a wrongful search or seizure.

Consider the stigma of a search warrant executions. Swaths of police officers arrive in squad cars and uniform. They spend hours inside a home, car, workplace, in full view of neighbors, colleagues, coworkers, or family.⁴⁸ What's worse, police have the power to hold an individual in custody throughout the search, regardless of its duration.⁴⁹ In fact, police can hold in custody individuals who happen to be present during a search, even if the warrant does not implicate that individual in any way.⁵⁰ Thus, a search warrant can become not merely a tool to obtain wrongful evidence, but a tool to wrongfully abuse citizens. A vindictive officer can easily use a warrant obtained without probable cause to harass individuals. This is especially problematic in over-policed areas, where police already possess a tremendous amount of power to harm and harass people of color.⁵¹

There is a reason that we hold privacy and security in our homes so highly. The Supreme Court held in *Payton v. N.Y.*:

To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even

46. See generally Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1179–83, 1187–89 (1987).

47. While data on the friendliness of police and magistrates is difficult to quantify, it is worth remembering how often magistrates see the same police day and out and how sparingly magistrates review warrant applications. Bloom, *supra* note 34, at 254; VAN DUIZEND ET AL., *supra* note 35, at 36, 94–102. It is also jarring to note how often police are wrong in their individual probable cause assessments. See Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 924 (2008). (Survey data shows that warrantless searches executed on police's assumption of probable cause yield evidence only about 12% of the time).

48. See Illya Lichtenberg, *The Dangers of Warrant Execution in a Suspect's Home: Does an Empirical Justification Exist for the Protective Sweep Doctrine*, 54 SANTA CLARA L. REV. 623, 629–33 (2014); see also Patrick Furman, *The Execution of Search Warrants*, 27 COLO. LAW. 33, 34 (Apr. 1998).

49. *Michigan v. Summers*, 452 U.S. 692, 705 701–04 (1981); *Muehler v. Mena*, 544 U.S. 93, 98–100 (2005).

50. *Summers*, 452 U.S. at 701–05.

51. Rachel Kent & John Ralphing, *Interview: How Policing in One US City Hurts Black and Poor Communities*, Human Rights Watch (Sept. 12, 2019, 12:01 AM) <https://www.hrw.org/news/2019/09/12/interview-how-policing-one-us-city-hurts-black-and-poor-communities> [<https://perma.cc/GM23-ANNN>].

when it is accomplished under statutory authority and when probable cause is clearly present.⁵²

Despite such lofty words from the Supreme Court, the Court has stood idle as warrant requirements have been eviscerated, allowing police to obtain warrants while barely considering probable cause.⁵³

Prosecutors often misbehave, too.⁵⁴ When prosecutors seeking warrants misbehave, the system must prevent them from obtaining or executing deficient warrants that can lead to unnecessary prosecution. Imagine, for example, a prosecutor wrongly suspected their neighbor was a murderer, and that prosecutor convinced a judge that probable cause to search the neighbor's house existed (when it did not). That prosecutor should not be able to subsequently prosecute their neighbor for a drug possession charge on drugs the officer happened to find during the search, since the search that found those drugs was illegal in the first place. Here, even if the evidence is suppressed (notwithstanding the far too forgiving good-faith doctrine announced in *Leon*), a prosecutor can still rely on illegally obtained evidence to advance investigations, which can become harassing, burdensome, or lead to future convictions on charges too attenuated from the illegal search to legally justify suppression.

While the stigma, potential for abuse and harassment, and invasiveness of a search warrant are severe, the extreme debasement of the execution of a wrongful arrest warrant should cause even greater shock of conscience.⁵⁵ An arrest carries with it even more stigma, humiliation, and prying eyes. As Bar-Gil and Friedman compellingly detail:

In most Fourth Amendment cases psychic injury is a major—if not *the* major—component of harm. Although property damage

52. *Payton v. New York*, 445 U.S. 573, 588–89 (1980) (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)).

53. *The Right to be Secure: The Foundation of the Fourth Amendment*, INST. FOR JUST., <https://ij.org/issues/ijis-project-on-the-4th-amendment/> [<https://perma.cc/8T8D-74M9>] (last visited Aug. 16, 2022) (“It turned out that courts were more than willing to put their thumb on the scale in the name of efficient law enforcement, often by holding that the government’s actions did not amount to searches or, if they did, that the government acting without a warrant was reasonable.”).

54. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 230 (2012); Russel M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. DAVIS L. REV. 1591, 1661–63 (2014) (arguing that prosecutors should have an ethical duty to adhere to the Fourth Amendment by suppressing wrongfully obtained evidence, but noting that that is not currently the case); Sara Gurwitsch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 324–31 (2010) (highlighting the failure of current deterrents to prosecutorial misconduct); Bar-Gill & Friedman, *supra* note 17, at 1626.

55. Bar-Gill & Friedman, *supra* note 17, at 1627 & n.71.

can occur when police engage in searches or seizures without probable cause—perhaps even great damage—for the most part, the psychological injury easily outweighs the property damage. It is undoubtedly difficult for most people even to comprehend the trauma of having police officials burst into one's home or of having one's liberty taken away by being seized, searched, cuffed, and shoved into the back of a police car. Victims describe the utter helplessness, the feeling of freedom being taken away, the inability to trust cops thereafter.⁵⁶

Arrests may also cause catastrophic collateral consequences, including missed wages, difficulties with childcare, health crises, job loss, forfeiting public benefits, and deportation. This is particularly disturbing given the disproportionate policing of people and communities of color.⁵⁷ Effects of arrests on access to public housing, for example, are especially egregious. “Public housing officials are free to reject applicants simply on the basis of arrest, regardless of whether the arrest results in convictions or fines.”⁵⁸ Finding post-arrest work can also become a Herculean task. “[E]mployers in most states can deny jobs to people who were arrested but never convicted of a crime.”⁵⁹ Over-policing increases arrests, which disproportionately exacerbates the collateral consequences of wrongful arrest warrants issued against people of color.⁶⁰

To provide increased relief for victims of rights violations, Congress and courts have been most supportive of ex post reforms such as providing civil remedies to those who have been wrongfully searched or seized. In 1871, Congress passed an early version of 42 U.S.C. § 1983, a prohibition on State support for the Ku Klux Klan and discrimination.⁶¹ After the end of Reconstruction, Section 1983 mostly fell out of use until it was resurrected as a viable civil rights litigation tool by the Supreme

56. *Id.*

57. See Wendy Sawyer, *Ten Key Facts About Policing: Highlights from Our Work*, PRISON POLICY INSTITUTE (June 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policingfacts/> [<https://perma.cc/Z4MV-5357>].

58. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 182 (2010).

59. *Id.* at 186.

60. Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 C.U.N.Y. L. REV. 172–73. (“These racial disparities also reverberate throughout the areas of citizenry affected as collateral consequences of arrests or convictions: employment, housing, access to government resources, and one’s ability to vote . . . [M]any advocates [therefore] focus on challenging racially unjust practices at the front end of the criminal justice system: [police encounters].”).

61. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665–67 (1978).

Court in 1961.⁶² But standing doctrine, limits on damages, limits on state and municipal liability, qualified immunity, and a host of other hurdles curb the potency of Section 1983 claims, especially as to Fourth Amendment violations.⁶³ Further, financial penalties barely deter state actors, particularly when governments indemnify the rare individual officers who are not protected by qualified immunity.⁶⁴ Take, for example, *Messerschmidt v. Millender*, which essentially applied *Leon* to civil cases by providing qualified immunity to officers who act on a warrant lacking probable cause, so long as the wrongfulness of the warrant was not egregiously obvious.⁶⁵ And when the government itself controls the treasury and shows no problem shelling out the minimal financial damages wrought by a wrongful search, there is little to deter government agents from disregarding policies that aim to penalize wrongful searches and seizures after they occur.⁶⁶ There are even fewer guardrails to prevent wrongful searches and seizures before they happen.

The power of the state against the individual criminal defendants has been clearly propounded upon by scholars and the Supreme Court.⁶⁷ Public defenders exist entirely to create some semblance of fairness when the state exudes its awesome might against an accused.⁶⁸ The Sixth Amendment right to assistance of counsel “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution

62. See generally *Monroe v. Pape*, 365 U.S. 167 (1961) (resolving that government officials acting under the color of law can be held accountable under § 1983 even where state law explicitly bars discrimination and detailing the history of the law).

63. See generally David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199 (2005); see also *Egbert v. Boule*, 596 U.S. 142 S. Ct. 1793 (2022) (further limiting Fourth Amendment claims against federal officers); but see *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (assuming civil liability to be “an effective deterrent” where Fourth Amendment right was violated by breach of knock-and-announce rule, but refusing to apply exclusionary rule to evidence seized from no-knock entry).

64. Bar-Gill & Friedman, *supra* note 17, at 1627.

65. 565 U.S. 535, 546–48 (2012).

66. David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1213–35 (2005) (providing examples of how damages fail to deter rights violations). If the government wants to break into the home of a perceived dissident and conduct an illegal search without prosecuting the dissident, what is to stop it them? The hundreds of dollars in damage to the person's property? The minute emotional damages the dissident might be entitled to? This is particularly troubling if the dissident is unpopular, and a jury is unlikely to empathize with them.

67. See e.g., *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

68. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1033–34, 1054, 1058 (2006) (citing Erwin W. Lewis, DEP'T OF PUB. ADVOC., DEF. CASELOAD REP. FOR FISCAL YEAR 2003-2004, at 4 (Sept. 2004), available at <http://dpa.ky.gov/library/caseload04.pdf>).

is presented by experienced and learned counsel.”⁶⁹ But the state, through the police, exercises one of its most brutal and bold powers long before a defendant has the chance to reach a trial: the power of criminal investigation.⁷⁰ A WC would exist to ensure that these life-altering and wrongful searches and arrests occur as infrequently as possible.

In addition to reducing individual harms, an adversarial warrant proceeding would also mitigate societal harms. The United States has the largest per capita prison population in the world—by a substantial margin.⁷¹ Over-policing is a large cause of this gross over-imprisoning.⁷² From 2000 to 2015 “between 19 and 23 percent of state prisoners were incarcerated for drug offenses. Those figures are even more striking in the federal system; during the same time period, between 55 and 60 percent of federal prisoners were incarcerated for drug offenses.”⁷³ Many prison reformists therefore advocate for legalizing drug possession, but this has largely proven politically unfeasible.⁷⁴ Strengthening warrant requirements would render it harder for police to find evidence of probable cause, and therefore reduce wrongful searches and the number of people imprisoned from wrongfully found drugs.⁷⁵ Without an adversarial warrant procedure, police have *carte blanche* authority to search people with mere inklings of suspicion, resulting in plain view seizures of items owned by many Americans, such as drugs or drug paraphernalia.⁷⁶ At least some of these drug charges would never occur under an adversarial warrant system, which would curtail some of police’s authority to search.

69. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

70. Note that many subjects of police investigations, particularly the innocent, never have the opportunity to obtain “experienced and learned counsel” because many police investigations do not lead to trial. See Bar-Gill & Friedman, *supra* note 17, at 1626–34.

71. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Dec. 20, 2020) [<https://perma.cc/AUG3-G7CP>].

72. Policing, PRISON POLICY INSTITUTE, <https://www.prisonpolicy.org/policing.html> (“Many of the worst features of mass incarceration . . . can be traced back to policing.”).

73. ACLU, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES, 3–4 (May 2015), <https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf> [<https://perma.cc/5EWN-SQVA>].

74. *Against Drug Prohibition*, ACLU, <https://www.aclu.org/other/against-drug-prohibition> (last visited Apr. 19, 2023) [<https://perma.cc/7ZPM-Q6MY>].

75. See, e.g., Michael J. Friedman, *Another Stab at Schneckloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313, 342–46 (1998) (discussing the relation of over-policing, consent searches, and plain view seizures and how they allow police to “substitute[e] deceit for probable cause”). Because police have such free reign to seize evidence even where probable cause is lacking, many more people are in prison for petty offenses such as possession than ought to be.

76. See, e.g., *id.*; Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 887–88 (2002).

Particularly in a post-*Leon* world, it is critical that the government lives up to its promises by ensuring that warrants are only granted when reasonable. The Constitution speaks in terms of prevention—not reparations—when rights are violated. US citizens have no constitutional right to compensation if the government unreasonably seizes your person; they have the right to freedom from that seizure in the first place. That right has been vastly under-protected and neglected. An adversarial warrant proceeding is a small step toward protecting that right. A WC would prevent forum shopping and magistrate disinterest or fatigue. It would also deter lazy or malicious policing in submitting warrant applications. If police know they will have to fervently argue that probable cause exists, they will be incentivized to complete non-invasive investigations and to verify the truth of their assertions against an individual before turning that individual's life upside-down with a search or arrest.

Establishing better warrant proceedings is an undeniably humble idea, because many, if not most, constitutional violations in searches and seizures come from *warrantless* arrests and searches.⁷⁷ Creating an adversarial warrant system, then, would not prevent the bulk of wrongful searches and seizures. Still, an adversarial warrant proceeding would create a more responsive and protective criminal-legal system during a criminal investigation.

II. THE WARRANTS COUNSEL IN PRACTICE

A proposal this novel necessitates some logistical planning. Because of the litany of organizational and legal differences across state criminal legal systems, which make logistical planning difficult, this section will operate only as a suggestion for federal WCs.⁷⁸

Crucially, this section seeks to propose just one way to structure a WC in practice. Nonetheless, this section first aims to provide an example of where in the machinery of the criminal legal system a WC would sit. Second, this section defines the scope and duties of the WC. Because this is a new approach, these are merely suggestions. Should WCs gain traction and become law, this Note hopes that the system is thoroughly contemplated to be as practical and useful as possible.

77. Amar, *supra* note 18, at 769–71.

78. Though I hope states will adopt this proposal under a system that works for them.

A. The Bureaucratic Structure of the Warrants Counsel

In practice, a WC is not as radical a departure from current practice as it might seem. States employ thousands of attorneys; adding a few more should not be a significant budgetary issue.⁷⁹ Additionally, there is nothing novel about having an attorney who is solely responsible for just one phase of the criminal prosecution. Many prosecutors' offices practice "horizontal prosecution" whereby an entire department is set up solely to deal with warrants, another with Preliminary Examinations, another with Grand Juries, and so on.⁸⁰ Thus, a standing division dedicated to warrant hearings, either based in the Courts themselves or through the Public Defenders' office, would not be exceptional.

This does, however, raise the question of who oversees the WC. This Note advocates for the WC to be based in the Public Defenders' office. This means that the WC could either be comprised of full-time staff (which the bulk of this section argues for) or existing public defenders who work in WC shifts on a rotating schedule.

There are three primary benefits to having the WC organized through the Federal Defenders Services (FDS) rather than through the courts, prosecutors' offices, or as a freestanding organization. First, it ensures that the bureaucracy, oversight, supervision, and structure required to create a wholly new legal position already exists and does not need to be built from scratch. Second, using the FDS ensures that those who sit on a WC are mission-driven to vigorously defend the rights of the accused. Third, it enables the independence necessary to advocate against the police and prosecutors and to ensure that magistrates reviewing warrant applications remain neutral and detached. After all, how can a magistrate remain neutral when they are supposed to inquire and pushback against a police officer's claims? Similarly, situating WCs in the FDS allows them to avoid the pressure inherent in arguing before

79. In 2021, 588 full- and part-time Magistrates reviewed 210,500 warrant applications. UNITED STATES COURTS, STATUS OF MAGISTRATE JUDGE POSITIONS AND APPOINTMENTS – JUDICIAL BUSINESS 2021, <https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2021> [<https://perma.cc/2TUN-A7ES>]; UNITED STATES COURTS, U.S. MAGISTRATE JUDGES – JUDICIAL BUSINESS 2021, <https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2021> [<https://perma.cc/9FNF-LZRZ>]. Thus, because magistrates handle much more than just warrant applications, the U.S. would need only hire somewhere around 294 WCs. This is, however, an incredibly rough estimate that relies on several assumptions that should be worked out by Congress to determine the actual best number of people for the job.

80. *Vertical or Horizontal? Depends on Your View*, PROSECUTOR'S DISCRETION (Feb. 13, 2012), <http://prosecutorsdiscretion.blogspot.com/2012/02/vertical-or-horizontal-depends-on-your.html> [<https://perma.cc/SCH7-ZNHK>].

a supervisor.⁸¹ Having a third-party challenge a warrant request allows magistrates—employees of the court—to remain neutral and thus stay true to their duties.⁸²

The invention of a new legal role is far from commonplace and is incredibly difficult. The greatest revolution in the legal profession was likely the advent of the fully-funded public defender, but criminal defense was not a new profession when the Criminal Justice Act was passed.⁸³ Perhaps the most inventive new legal role was the creation of federal magistrates, through the Federal Magistrates Act of 1968.⁸⁴ Even with the entire machinery of the well-bureaucratized federal judiciary behind it, however, the implementation of magistrates into the federal courts was not without its problems.⁸⁵ Thus, it is difficult, if not impossible, to fathom creating a wholly independent organization devoted solely to warrant proceedings. As a “well-developed” bureaucracy, the Federal Defender is an independent authority that is respected by prosecutors and courts alike that would undoubtedly be eager to expand their ability to protect the rights of the accused by creating a WC division.⁸⁶ It is also more economically efficient to have WCs overseen by the supervisors already in place at the Federal Defenders office. There is no need to create an entirely new governmental bureaucracy when a thriving and capable one already exists to hire, evaluate, promote, and supervise WCs.

Critically, the Federal Defender is mission-driven to safeguard and enforce the rights of individual defendants.⁸⁷ Public defenders would already be familiar with much of the role of a WC. The WC, like the

81. It should be noted that the Federal Defenders themselves are funded and organized through the Courts of Appeals, a practice which has been subject to criticism for much the same reasons this Note argues the WC should be independent from the judiciary. See David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 388 (2017). Patton's arguments do not pose as serious an issue under the WC Program, where the WCs will only be arguing in front of Magistrate Judges at District Court. Still, where WC testimony or a Magistrate's decision is the subject of an appeal there are some independence issues raised.

82. Bar-Gill & Friedman, *supra* note 17, at 1639, n.124 (discussing scholarship concerned with worries about magistrates' role as a rubber stamp; though ultimately minimizing those concerns) (citing Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 n.63 (1988) (using the term “rubber stamp” to refer not only to magistrates who are not “neutral and detached” but also to magistrates who subject the warrant application to only “perfunctory review”).

83. Patton, *supra* note 81, at 338–39.

84. See William E. Doyle, *Implementing the Federal Magistrates Act*, 39 J. KAN. BAR ASSOC. 25, 25 (1970) (explaining the creation of federal magistrates under the Federal Magistrates Act, as well as the challenges the creation of this new class of legal jobs generated).

85. See *id.*

86. Patton, *supra* note 81, at 340–45, 395.

87. See *About Defender Services Office*, FED. DEF. SERV. OFF. TRAINING DIV., <https://www.fd.org/about-us> (last visited Jan. 16, 2023) [<https://perma.cc/L72F-4FVA>].

Federal Defender, would be adverse to the prosecution and police seeking a warrant; they would often be thrown into a case with little resources or foreknowledge; and they would often lack the advantage of having time to investigate as thoroughly as the police. These unfortunate similarities are necessary byproducts of the WC role under current warrant procedure and are good explanations for why the Federal Defenders is a good home for WCs.

Defenders get into the work, hopefully, because they believe in the promises of the Constitution to an individual accused of a crime. They are willing to work from a significant disadvantage to fight for those individuals' rights. And they are, unfortunately, willing to lose their cases often. These types of individuals are necessary for the WC to thrive. Indeed, for the WC to attract the appropriate people and to fully realize its vital function, it must be located within the Federal Defenders' office.

Granted, some aspects of a WC would be new to the FDS and actually more akin to a prosecutor's role. WCs would protect the rights of every individual, not just the indigent; and they would represent the People, not an individual client. But many public defenders already consider themselves the true defender of the People and these minute differences would have little consequence on the content of WC work. Defenders are able and ready to defend the rights of anyone, and importantly, the rights of everyone the state intends to investigate and potentially prosecute.

Finally, independence is critical for the WC to adequately flourish. A WC cannot contain individuals who work for the judiciary who are angling to impress judges or work their way into a clerkship. Nor can it afford individuals who work within a prosecutors' office—for it would be unimaginable and unethical to have two adversaries based in the same office. The uniqueness of the position gives rise to certain ethical issues regarding defending an individual that does not know they are being defended.⁸⁸ This Note argues that these issues are easily overcome by the fact that an individual is always better off having their rights preciously guarded than not. But the ethical issues of having an individual's rights guarded by a judicial officer are difficult to navigate,

88. See, e.g., MODEL RULE OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."). Because this is a Fourth Amendment protection, and not a Sixth Amendment protection, rights of the individual to choose their own defense and confront the witnesses against them should not apply.

and it is far better to keep the WC independent from the body that might be overseeing other aspects of their case.⁸⁹

B. *The Warrants Counsel in Court*

An institutionalized WC would have more sweeping effects than just keeping warrant proceedings from becoming too lackadaisical. They would also protect individual liberties in a way promised by the Constitution, but never fully actualized by the United States government. WCs—permanent fixtures in the courtroom during warrant proceedings—would be ideal counterbalances to overly chummy police officers. They would also help ensure warrant proceedings maintain the gravitas they demand. Given the serious deprivation of individual rights that are concordant with a granted warrant, opposition to the police or prosecutor seeking a warrant is critical to prevent warrant proceedings from becoming a farce of justice.⁹⁰

In many respects, the adversarial warrant proceeding would be similar to a Preliminary Examination, except that the defendant would not be present, and no defense witnesses would be presented. Instead, the prosecutor or police officer seeking the warrant would be required to provide the WC with all case notes and evidence (both inculpatory and exculpatory) related to the incident under investigation and the person or place to be searched or arrested. Using this evidence, a mini-trial would ensue whereby both the warrant-seeker and the WC would present arguments for and against issuing the warrant and the existence of probable cause. The WC would be able to cross-examine the warrant-seeker and ensure that no information is being withheld from the reviewing magistrate.

By presenting the magistrate with two sides to an argument, the magistrate can remain *genuinely* neutral and detached. In current warrant proceedings, magistrates are expected to essentially cross-examine the warrant-seeker.⁹¹ But magistrates rarely take the time necessary to establish probable cause during this probe.⁹² Further, a truly neutral

89. See Patton, *supra* note 81, at 383–90.

90. See Amar, *supra* note 18, at 762–67, 773–74, 778–82 (arguing that warrant proceedings are spectacles of injustice because they make it seem like the criminal-legal system is taking individual rights seriously—even when these proceedings are not—and arguing that the warrant requirement has become a tangled mess).

91. FED. R. CRIM. P. 41(d)(2).

92. See VAN DUIZEND ET AL., *supra* note 35, at 26 (1985).

party cannot adequately probe or doubt the evidence presented to them with the interest and care of an adversary.⁹³

The United States has explicitly and vigorously decided that neutrality is not the best way to achieve the goals of justice. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”⁹⁴ Why then, do we reserve the best practice we have for promoting justice until after the incalculable harms of a wrongful arrest or search have occurred? Indeed, some scholars have argued judges themselves have a right to have qualified counsel argue before them so they can properly rule on a case.⁹⁵ Why shouldn’t magistrates be afforded the same right in their oversight of warrant requests?

Take the case of Mr. Williams, discussed in the beginning of this Note. Had a WC existed and argued against the warrant for his arrest, they could have evinced before the magistrate: (1) the unreliability of the photo used in the facial recognition technology search; (2) the non-eyewitness status of the only “identifying witness”; (3) the lack of effort that had been put into the case; and (4) the lack of probable cause to arrest Mr. Williams. They could have drawn out these conclusions by asking the investigators questions. They could have researched, and thus been able to accurately argue, that facial recognition technology is unreliable in such circumstances as were present in this case. The WC also would have been able to ask the obvious question of why a Loss and Prevention Specialist who worked for a third-party company was a witness to the crime. When the officer responded that, in fact, she was not an eyewitness, their entire case for probable cause (already barely existent) would have shattered.

There may, however, be some cases where a WC truly believes the officers have done a thorough investigation and that probable cause exists. In such a case, a WC should still argue against probable cause to the extent possible. They should ensure the warrant is as non-invasive and particular as possible, and that police cannot overstep their court-granted authority.⁹⁶ This role is similar to the Federal Defender whose client has admitted guilt. The Defenders duty is not over when a client

93. See, e.g., Irving Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975); *United States v. Cronin*, 466 U.S. 648, 655–56 (1984); *United States v. Morrison*, 449 U.S. 361, 364 (1981).

94. *Herring v. New York*, 422 U.S. 853, 862 (1975).

95. Kaufman, *supra* note 93, at 569–71.

96. See *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (“[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional . . .”) (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984)).

admits guilt; they must still vigorously advocate for an adequate plea and appropriate sentencing.

Finally, the WC may be called upon at trial to testify that a warrant hearing was adequate and may have some role in ensuring the warrant was exercised lawfully. The ancillary-duties of the WC can be fleshed out in subsequent literature.

III. THE LEGISLATURE MUST ACT TO PROTECT CITIZENS' FOURTH AMENDMENT RIGHTS

The Supreme Court has failed in its duty to uphold and enforce the Fourth Amendment rights of the individual against the State. In 1975, four concurring Justices in *Gerstein v. Pugh* argued that the majority's dicta extended "less procedural protection to an imprisoned human being" than to a host of property rights by failing to take notice of the importance of judicial hearings on probable cause.⁹⁷ The concurring justices went on to remind the majority of the presumption of innocence and import of the Fourth Amendment.⁹⁸ Twenty years later, Justice Stevens dissented in *Arizona v. Evans* to note that the majority seemed to have forgotten the purpose of the Fourth Amendment when the majority created yet another warrant exception for when police wrongfully seize someone based on a clerical error.⁹⁹ Justice Stevens lamented that the majority's holding was "outrageous" and that they failed in their duty to protect with "jealous regard . . . the integrity of individual rights" provided by the Fourth Amendment.¹⁰⁰

As time goes on, it seems the Fourth Amendment stands on shakier and shakier ground, with fewer Justices speaking out for its protection. The current Court seems wholly uninterested in protecting "the fundamental right of the people 'to be secure in their persons, houses, papers, and effects,' against *all* official searches and seizures that are unreasonable."¹⁰¹ If the Fourth Amendment is to have any of its intended mean-

97. *Gerstein v. Pugh*, 420 U.S. 105, 127 (1975) (Stewart, J., concurring).

98. *Id.*

99. *Arizona v. Evans*, 514 U.S. 1, 18–19 (1995) (Stevens, J., dissenting).

100. *Id.* at 23 (quoting *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)). See SHIFTING SCALES: HOW THE ROBERTS COURT IS INTERPRETING THE FOURTH AMENDMENT, *Chapter 1: Investigation*, OYEZ & ISCOTUS <https://projects.oyez.org/shifting-scales/> (last visited Apr. 19, 2023) [<https://perma.cc/63XC-YWD8>] (explaining the weakening of the exclusionary rule and deferral to police); *id.* at *Chapter 2: Arrests* (detailing how the Robert's Court has not questioned the "many warrantless exceptions for searches incident to arrest.").

101. *Evans*, 514 U.S. at 18 (Stevens, J., dissenting).

ing and purpose, it will not be found by the Supreme Court.¹⁰² Scholars have theorized that the exclusionary rule, long the ire of right wing justices, is on its way out under the Roberts Court.¹⁰³ Some have even posited that the Roberts Court may find the whole of the Fourth Amendment irrelevant.¹⁰⁴ With sights set on stripping the Fourth Amendment of its only current protection and enforcement mechanism, it seems hopelessly futile to expect judicial action to protect individuals' Fourth Amendment rights. Thus, we must turn to the legislature.

"Legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers."¹⁰⁵ Yet legislatures, just like the Court, must maintain strict adherence to the Constitution and have a duty to create laws that promote the rights it enshrines.¹⁰⁶ Proposing a legislatively imposed supplement or replacement to the exclusionary rule is not wholly unique.¹⁰⁷ Professors Estreicher and Weick argue that the exclusionary rule should be replaced with legislation meant to create a Fourth Amendment watchdog of sorts through the Department of Justice.¹⁰⁸ This Note disagrees. But this Note does agree that the Legislature has the unique ability to experiment and craft rules that reflect the goals of the Fourth Amendment.¹⁰⁹ Unlike the courts, legislative solutions also allow rule-drafters to amend rules that do not work as well as was hoped. Thus, as Congress experiments with the breadth and purpose of the WC, they can amend its power and duties as experience necessitates.

Indeed, Congress is no stranger to legislating on the Fourth Amendment—although at times they have acted against its interest. In 1995, the House of Representatives passed the Exclusionary Rule Reform Act, which would have effectively barred the exclusionary rule in

102. See generally Michael Edmund O'Neill, *(Un)reasonableness and the Roberts Court: The Fourth Amendment in Flux*, 2008 CATO SUP. CT. REV. 183 (2009–2010).

103. Tracy Maclin & Jennifer Marie Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1227 (2012).

104. See generally Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191 (2010).

105. *Illinois v. Krull*, 480 U.S. 340, 365–66 (1987) (O'Connor, J., dissenting) (citation omitted).

106. *Marbury v. Madison*, 5 U.S. 137, 176–79 (1803).

107. See e.g., Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949 (2010); Jonathan Yates, *Congress Needs to Act on Exclusionary Rule*, DES MOINES REG. (June 25, 2018, 11:29 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2018/06/25/congress-needs-act-exclusionary-rule/731005002/> [perma.cc/82N4-GF2Q] ("Standardizing the Exclusionary Rule by an act of Congress is needed to protect the citizens of the United States and their Fourth Amendment and inalienable rights . . .").

108. See Estreicher & Weick, *supra* note 107, at 951–52.

109. See *id.* at 951, 960.

federal criminal trials.¹¹⁰ It is clearly within Congress's power to act on this important issue.¹¹¹ With nearly every American in favor of criminal legal reform,¹¹² Congress must act now to enforce the rights promised to the People by the Fourth Amendment. Congress is allowed to think creatively—they need not simply codify the court-made exclusionary rule. Congress should strengthen warrant requirements, undo most warrant exceptions, and create a WC that is prepared and funded to act as adversaries against the State when the State seeks to encroach on an individual's rights.

Congress must act now to create a WC dedicated to protecting the rights of the People to be free from “unreasonable searches and seizures . . . without probable cause.” Behind the scenes, a WC would serve a critical interpersonal role: keeping magistrates from becoming too chummy with police. Procedurally, a WC would hold police accountable when they seek warrants fight for individuals who are not even aware they need their rights fought for and be available to testify about shoddy or suspicious warrant proceedings in § 1983 or criminal trials. And ultimately, the WC's very existence would prevent shady proceedings from occurring in the first place.

IV. THE FAILURES OF POTENTIAL ARGUMENTS AGAINST ADVERSARIAL PROCEEDINGS

In the wealth of writings on amending warrant proceedings, there are, broadly speaking, five main arguments against *ex ante* alterations to the Fourth Amendment: (A) worries about hampering police in the event of exigencies; (B) the political unpopularity of making police officers' lives ‘more difficult’; (C) concerns about costs and further burdening a jammed up court system with yet more legal hurdles; (D) hesitations about ‘making the wrong call’ *ex ante*; and (E) assertions that more stringent warrant requirements would make police less willing to seek warrants and more reliant on warrant exceptions.¹¹³ These five arguments would likely be levied against an *ex ante* adversarial warrant

110. See H.R. 666, 104th Cong. (1995).

111. Estreicher & Weick, *supra* note 107, at 951, 964–65.

112. Colleen Long & Hannah Fingerhurt, *AP-NORC poll: Nearly all in US back criminal justice reform*, ASSOC. PRESS (June 23, 2020), <https://apnews.com/article/police-us-news-ap-top-news-politics-kevin-richardson-ffaa4bc564afcf4a90b02f455d8fdfo3> [<https://perma.cc/NC48-X689>] (95% of Americans say the system needs at least minor changes; 69% of Americans believe the system needs major reform or a complete overhaul).

113. See generally Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123 (1996); Amar, *supra* note 18.

proceeding as well. This section dismisses these arguments by explaining why an adversarial warrant proceeding minimizes risks and provides significant social benefits.

A. Hampering Police

Any increase in warrant requirements raises concerns about hampering police. But police would not be hampered in their investigations by requiring more adequate investigation before police apprehend or search a suspect. Wrongful arrests are abundant in the United States.¹¹⁴ These wrongful arrests typically begin when police determine an individual is a suspect before the evidence proves the same.¹¹⁵ By requiring police to gather evidence *first* and identify a suspect *from that evidence*, this proposal helps police become more effective in their duties.¹¹⁶ By the same theory, this proposal should also limit wrongful convictions.¹¹⁷ Police cannot be hampered in their duties by a requirement that they do their duties adequately. When an officer lacks the evidence required to establish probable cause, it does not mean that a suspect has gotten away. Instead, it simply means the officer has more work to do in determining probable cause and to finding the right suspect. In a system that works, this initial warrant rejection is not a flaw, but a critical feature of a well-functioning criminal-legal system.

WCs would help magistrates perform their duties more adequately, too. With a WC present, magistrates would be more cognizant of the extreme burden a police search or seizure entails and the need to have evidence-based (not gut-feeling, intuition-based) policing.¹¹⁸

114. Charles E. Loeffler, Jordan Hyatt, & Greg Ridgeway, *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANTITATIVE CRIMINOLOGY 259 (2019) https://link.springer.com/article/10.1007/s10940-018-9381-1?wt_mc=Internal.Event.1.SEM.ArticleAuthorOnlineFirst [<https://perma.cc/P6G3-YUB6>] (estimating that wrongful convictions occur in six percent of convictions leading to imprisonment in state prisons).

115. See Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 732-34 (2016).

116. Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 262 (2010) (promotion of inaccuracy in criminal investigations stems from Supreme Court precedent permitting “police to indulge racial and cultural animus at the expense of meaningful investigation of crime” by allowing policing “based on gut feeling”).

117. 3,051 wrongfully incarcerated individuals have been exonerated since 1989. At least 752 of those exonerations involved either official misconduct or false confessions. See generally THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Apr. 19, 2022) [perma.cc/9MYX-ZKYQ].

118. Foley, *supra* note 116, at 261-62 (“[W]hen police are not required to think, courts are not required to do so either.”).

But what about exigencies? Exigency exceptions to the warrant requirement already exist.¹¹⁹ In the event that a life is in danger or public safety is at risk, for example, police need not seek warrants.¹²⁰ This Note is not arguing that rule should change. Even the destruction of evidence exigency or the hot pursuit doctrine may be maintained as a valid exigency—so long as exigencies are not police-created. Undoubtedly, police-created exigencies should not be maintained as a valid exception to the warrant requirement for fear that police will consistently create exigencies (such as by spooking suspects into destroying evidence in order to access their homes) instead of obtaining warrants.¹²¹ However, in creating a WC, legislatures should broaden Fourth Amendment protections. For example, when police act erroneously on their subjective beliefs, the evidence they obtain must be excluded.¹²² Further, when police wrongly act without a warrant, the officer should face *ex post* discipline, be it demotion, pay cuts, or a performance improvement plan.¹²³ Those rules notwithstanding, an adversarial warrant proceeding and more stringent warrant requirements would not impact exigencies.

Critics of warrant restrictions also levy arguments about police safety.¹²⁴ Protecting lives is paramount. But it must be noted that police currently experience relative safety in their profession when compared to loggers, roofers, garbage collectors, farmers, crossing guards, and

119. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (“the exigencies of [a] situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment”) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

120. *Warden Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967); *see Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

121. *But cf. Kentucky v. King*, 563 U.S. 452 (2011) (adopting an exigency exception to the warrant requirement even where police create the exigency except where police created the exigency by violating the Fourth Amendment).

122. Generally, this is not how the Court responds to police actions. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intent plays no role in ordinary, probable-cause Fourth Amendment analysis.”).

123. This is this Note’s only discussion of consequences should police violate the more stringent warrant requirements proposed. This Note is not the place to determine how to handle officers who violate the law. However, it is still worth noting that these proposed solutions have a direct impact on individual officer(s) who committed the wrong. Rather than requiring civil suits, which often do not impact individual police officer behavior because those officers are either indemnified or are judgment-proof, the response to these violations must actually influence police behavior by impacting their personal lives.

124. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 609 (Breyer, J., dissenting) (“[S]ome government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional . . . compliance); *cf. Kemal Alexander Mericli, The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 SEARCH AND SEIZURE L. REP. 129, 130 (1989) (noting that some “[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official authority”).

grounds maintenance workers, to name a few.¹²⁵ It has even been shown that the false narrative that police face constant and extreme danger actually puts the police and the public in greater harm's way than were the myth discarded.¹²⁶ For example, because police perceive greater harm in their jobs than they actually face, they often deviate from policies to protect themselves, such as by failing to wear a seatbelt because it gets in the way of their tactical gear.¹²⁷ Notably, the number one cause of accidental police death is motor vehicle accidents,¹²⁸ which are, of course, all the more lethal when a vehicle passenger is not wearing a seatbelt.

Understandably, some argue it was the introduction of extra-legal police powers (such as a warrantless search incident-to-arrest) that has protected police in recent years¹²⁹ – although it is not at all apparent that searches incident to arrest, or any encroachment on individual rights, has anything to do with police officer safety.¹³⁰ Nonetheless, this Note is not arguing that searches incident-to-arrest should be barred. However, as it stands today, police perform searches incident-to-arrest for police safety, *not* because they have probable cause to search a suspect. The WC would ensure that searches incident-to-arrest are only performed

125. 25 *Most Dangerous Jobs*, U. DELAWARE (Dec. 14, 2020), <https://www.facilities.udel.edu/safety/4689/> [<https://perma.cc/9MAY-WME4>]. Uniform Crime Report data for 2019 shows that only forty-eight members of law enforcement were not accidentally killed. U.S. DEP'T OF JUST., FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1 (2020), <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed.pdf> [<https://perma.cc/DWZ9-GN2M>]. That amounts to .0001% of law enforcement in the United States (based on FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: POLICE EMPLOYEE DATA T71 <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-71> (443,173 officers were employed across the US). While any number would be too high, compared to the number of stops police make, it seems clear that police are very safe and growing safer annually. Compare that data to data for the 2017-18 school year, where 46 school-associated violent deaths occurred in the United States. NAT'L CTR. FOR EDUC. STAT., VIOLENT DEATHS AT SCHOOL AND AWAY FROM SCHOOL AND SCHOOL SHOOTINGS (2022), <https://nces.ed.gov/programs/coe/indicator/a01> [<https://perma.cc/TF7Q-BDEA>]. It is nearly identically as dangerous to be in a school as it is to be a police officer.

126. Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, 55 L. & SOC'Y REV. 70 (2021).

127. *See id.* at 89–93.

128. U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, LAW ENFORCEMENT OFFICERS ACCIDENTALLY KILLED, 2015-2019 T65, <https://ucr.fbi.gov/leoka/2019/tables/table-65.xls> (2019).

129. *See, e.g.*, Friedman, *supra* note 75.

130. The Supreme Court upheld searches incident-to-arrest as constitutional in 1959. *Chimel v. California*, 395 U.S. 752, 762–63 (1969). Felonious police deaths were at an all-time high fourteen years later in 1973. Lorie A. Fridell & Anthony M. Pate, *Death on Patrol: Felonious Homicides of American Police Officers*, THE POLICE FOUND., <https://www.ojp.gov/pdffiles1/Digitization/159609NCJRS.pdf> [<https://perma.cc/2ZKW-HFXG>] (Draft Final Report) (1996). Though felonious police deaths have long been declining, this has little to do with the denigration of individual rights in favor of police safety.

when police actually have probable cause to perform the search. Under a WC system, police would be required to obtain a warrant before almost every arrest. Probable cause to search an individual's person is essentially a given when police have probable cause to conduct an arrest.¹³¹ Thus, by ensuring probable cause actually does exist through the adversarial warrant proceeding, we can be more assured that individual rights are protected during a search incident-to-arrest because police would no longer be searching those arrested without probable cause.

Finally, there should be no concerns that a heightened warrants requirement would burden police with more suspects fleeing or evading arrest. Generally, heightened warrant requirements are unlikely to cause any issue for police because warrant proceedings take place before a suspect knows they are a suspect. Individuals often have no idea they are under police suspicion before a warrant is executed; thus, waiting to investigate until probable cause exists before obtaining the warrant should not alert potential suspects or cause them to flee. The time lost between obtaining probable cause, arguing for it, and then obtaining a warrant is marginal—so long as probable cause actually exists.

Critics would likely argue that this *ex ante* oversight would slow down police and make it harder for them to do their job. However, for at least three reasons, critics need not worry. First, policing should not be easy. In pursuit of a more perfect union, the Founders intended to make it more difficult for the State to utilize its monopoly on violence.¹³² The Framers were generally wary of the power of the King and of a judiciary aimed at harassing political opponents.¹³³ They purposely restricted grants of general warrants (broad and nonspecific grants to police to search and seize arbitrarily).¹³⁴ Thus, the Fourth Amendment, and particularly the warrants clause, was born to reign in the power of the state from using its military and police too liberally.¹³⁵ Since then, the Supreme Court has loosened the Constitutional reins on the police, which has created or exacerbated many of current institutional faults in our police system.¹³⁶

131. *Chimel*, 395 U.S. at 762–63 (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested . . .”).

132. See Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 309–12 (2016).

133. *Id.* At the time, in England, the police were organized through the judiciary.

134. *Id.* at 310.

135. *Id.* at 309–12.

136. Bar-Gill & Friedman, *supra* note 17, at 1619–20. This is not to say that the systemic racism enshrined in our government, and thus in our police force, would go away because of greater Constitutional limits on policing. However, the extreme abuse of power and discretion police exercise

Second, a WC should ease the burdens of police. Depending on their size, police forces may see hundreds of civil suits a year emerging from their misconduct—these lawsuits typically arise against the backdrop of wrongful arrests or searches and excessive use of force.¹³⁷ These suits result in millions of dollars paid out by government entities indemnifying their police officers' misbehavior.¹³⁸ By minimizing the ability of the police to wrongfully arrest and search someone, and by limiting the amount of force police are able to yield (since warrants can specify the amount of force authorized), these costly lawsuits could be avoided.

Third, and most importantly, police are already required to submit warrant applications, so a heightened warrant system does not create an extra requirement for them. The fact that they often do not submit warrant applications is no excuse for allowing them to continue doing so. The Constitution is the supreme law of the land and requires that no warrant be granted without probable cause.¹³⁹ Creating a warrant system that is more functional and requires more investigative work means creating a system in which police fulfill their job requirements, even if that makes their jobs harder in practice.

B. Political Unpopularity

According to Gallup polling, a majority of Americans (fifty-eight percent) believe that U.S. policing is in need of “major change.”¹⁴⁰ Yet, Americans are deeply divided on just how to reform police.¹⁴¹ The WC model would leave police departments intact but protect people from police abuse. By making it more difficult for the police to interact with perceived criminals, an adversarial warrant proceeding—tied with heightened warrant requirements and closed warrant loopholes—prevents police abuse.

could and should be minimized by making it more difficult to harass an individual with unwarranted searches or seizures.

137. See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

138. Amelia Thomson-DeVeaux, Laura Bronner, & Damini Sharma, *Cities Spend Millions On Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable.*, FIVETHIRTYEIGHT (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/> [<https://perma.cc/E5PY-XP5E>].

139. U.S. CONST. art. IV, § 2; U.S. CONST. amend. IV.

140. Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes,'* GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [<https://perma.cc/Z6S7-LKU5>]. An additional thirty-six percent of Americans think policing needs minor changes. *Id.*

141. *Id.*

A reform to the legal structure of policing, and not a reform to police behaviors or police funding, may be a great middle ground—a compromise that limits (though does not eliminate) over-policing, while largely leaving police budgets intact. In fact, ending the most intrusive warrantless police practices is already an incredibly popular proposal. “Overall, 74% of Americans support the idea of ending stop-and-frisk policing altogether, with 58% saying they strongly support it.”¹⁴² Where cities and states are divided on how to address these issues,¹⁴³ a proposal that asks more of its legal system to protect the rights of individuals—particularly individuals in over-policed areas—while also leaving intact so much of what police proponents care about, may be an ideal solution. Neighbors can feel safe knowing that police continue to exist, but individuals can feel safer knowing their rights are being guarded by an advocate who could ensure that police cannot arbitrarily search their home or person.

Even were this proposal unpopular, it should not matter. Constitutional rights do not care about, and in fact, were designed to supersede, political popularity.¹⁴⁴ That is especially true of Fourth Amendment rights. “Fourth Amendment rights have at times proved unpopular; it is a measure of the Framers’ fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself.”¹⁴⁵ With the Fourth Amendment an “embarrassment,” Congress and courts have a duty to act.¹⁴⁶

Americans tend to favor expanded protections of their rights. Though no data exists on the popularity of *Miranda* rights just after they were created in 1966, polling data shows *Miranda* was codified at a time when respect for police was at an all-time high.¹⁴⁷ It seems inferable that when Americans revere police, they do not want officers to be sad-

142. *Id.* Americans clearly take issue with practices that shirk the probable cause requirement (since *Terry* stop-and-frisks are the only seizures and searches that do not require probable cause). Notably, exactly fifty percent of Americans strongly or somewhat support eliminating enforcement of nonviolent crimes. *Id.* The divide on how to reform policing is immense and right down the middle. But creating an extra layer of judicial protection with an adversarial hearing can reduce politically unpopular police stops while maintaining more popular police practices (which, to be clear, this Note is not endorsing as good policy).

143. See Ram Subramian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST., (May 21, 2021) <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [https://perma.cc/38FU-FSXF].

144. See, e.g., THE FEDERALIST NO. 10 (James Madison).

145. *Illinois v. Krull*, 480 U.S. 340, 365–66 (1987) (O’Connor, J., dissenting) (citation omitted).

146. Amar, *supra* note 18, at 757; See *Marbury v. Madison*, 5 U.S. 137, 173–74 (1803).

147. In 1966, a greater portion of Americans had “a great deal of respect” for police officers than almost any other time since Gallup began polling on the topic. Justin McCarthy, *Americans’ Respect for Police Surges*, GALLUP, (Oct. 24, 2016), <https://news.gallup.com/poll/196610/americans-respect-police-surges.aspx> [https://perma.cc/QD42-DGH2].

dled with even more regulation and red tape. *Miranda* did just that, and it did so quite suddenly. And yet, as recently as 2000, ninety-four percent of Americans supported police reading people their *Miranda* rights.¹⁴⁸ Safeguarding Constitutional rights is apparently popular and a good long-term policy; like the public acceptance of *Miranda* warnings, the adversarial warrant proceeding suggested here could eventually be met with similar approval.

C. Concerns About Court Resources

In awareness that the debate around court resources is a topic deserving much more discussion than this Note can provide, the author nonetheless feels compelled to say this: concerns about court resources are unjustifiable, not because they are insincere, but because they are illegitimate. It is a gross disappointment for the State to use its own administrative failures to justify further administrative failures, especially when those failures cause a trampling of rights. That the Senate continues to let judicial confirmations stagnate and that Congress refuses to expand the federal bench does not mean the United States can shirk its obligation to protect individuals' rights in the name of conserving judicial resources.¹⁴⁹ If we worry judges are inundated, the solution is to hire more judges.¹⁵⁰ The solution is not to make it more difficult for people to access their fundamental right to be heard in court.

That complaint notwithstanding, this proposal does not drain court resources. The amount of litigation and judicial resources spent on suppression motions is immense.¹⁵¹ Even despite *Leon's* very clear announcement anointing warrants lacking probable cause with legality,

148. *Supreme Court's Miranda Decision*, GALLUP (June 27, 2000), <https://news.gallup.com/poll/2779/supreme-courts-miranda-decision.aspx> [<https://perma.cc/5559-6SV3>]. Notably, the same survey showed Americans were almost exactly evenly divided on whether to use the exclusionary rule when *Miranda* rights had been violated. *Id.*

149. Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, 'Desperation' Hits the Bench*, LAW360 (Mar. 19, 2019) <https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench> [<https://perma.cc/L9HC-WSMN>].

150. For a thorough examination of the need for expanding lower courts, see Maggie Jo Buchanan & Stephanie Wylie, *It Is Past Time for Congress to Expand the Lower Courts*, CTR. FOR AM. PROGRESS (July 27, 2021) <https://www.americanprogress.org/article/past-time-congress-expand-lower-courts/> [<https://perma.cc/46BC-FF74>]; see also Lower Court Expansion, DEMAND JUST., <https://demandjustice.org/priorities/lower-court-expansion/> [<https://perma.cc/2U6E-C8H9>] (“[O]ur courts are overwhelmed with cases, leaving Americans waiting years for access to justice and courts forced to adopt shortcuts that hurt people who are not rich and powerful.”).

151. See Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 443–45 (1999). Suppression hearings also cost Defendants a great deal since they invite police perjury. Bar-Gill & Friedman, *supra* note 17, at 1651–52.

federal courts have adjudicated thousands of *Leon* challenges. What's more, civil actions resulting from Fourth Amendment violations take up a significant chunk of judicial space.¹⁵² While some may argue that requiring more litigation during the investigative beginnings of a criminal proceeding would waste judicial resources, these critics are wrong. Adversarial warrant proceedings would generally occur in front of a magistrate judge, keeping district judges' hands free of dealing with warrant problems. They would reduce the need for suppression hearings and free up prosecutors' and defenders' time so that the merits of a case, not the failures of the police to adhere to the constitution, can be argued. WCs would also keep cases that ultimately fail (whether by dismissal, overturn on appeal, or jury verdict) out of courts in the first instance by ensuring would-be wrongfully obtained evidence is never obtained.

Unlike district judges, Congress does not appoint magistrate judges. District Court judges "appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine"¹⁵³ It is up to the judiciary, with relatively unfettered power, to determine how many magistrates are required to serve on the federal bench.¹⁵⁴ Therefore, requiring more timely warrant hearings, though potentially requiring the judiciary to add more magistrates, would actually free the dockets of many appointed judges. In fact, unlike any other *ex ante* or *ex post* remedy to the current warrant crisis, adversarial warrant proceedings should free up judicial resources by placing more onus on magistrates and thus saving courts from more costly and time-consuming downstream litigation. More onerous warrant hearings would almost certainly prevent thousands of suppression motions from needing to be filed, and they would keep meritless cases out of the courts at the onset.

Establishing a party in courtrooms to counter a police officer's otherwise unopposed narrative and to remind judges of their duties to deeply consider probable cause would better support a functioning legal

152. Bar-Gill & Friedman, *supra* note 17, at 1632–34.

153. ADMIN. OFF. OF THE U.S. CTS, MAGISTRATE JUDGES DIV., THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 61 (2010), <http://www.nced.uscourts.gov/pdfs/Selection-Appointment-Reappointment-of-Magistrate-Judges.pdf> [https://perma.cc/XBG5-A882] (quoting Federal Magistrates Act, 28 U.S.C. § 631). The Judicial Conference determines the appropriate number of magistrates by surveying courts and determining how much additional help they need. The Director of the Administrative Office of the United States Courts can conduct these surveys whenever needed. *Id.* at § 633. Such a survey could be conducted when the law calls for more stringent probable cause hearings because of the creation of a WC.

154. *Id.* Though Congress must allocate funding for more magistrates, that would likely be a part of the law Congress passes to create adversarial warrant proceedings.

system. This is exceedingly true in a judicial system where police often lie, typically without fear of reprisal.¹⁵⁵ To argue otherwise would be akin to suggesting that criminal defendants do not need a defense attorney since a judge sits to act as a check on the prosecution. In making a more effective criminal legal system, WCs would save, not cost, judicial resources.

D. Letting the Guilty Walk

Perhaps the greatest worries police-advocates have regarding ‘burdens’ on the investigative process involve ‘letting criminals get away.’¹⁵⁶ As has been said here repeatedly, the Fourth Amendment codifies the belief that it is better to let the guilty walk free than to burden the innocent with unreasonable searches and seizures.¹⁵⁷ Nonetheless, when claims of rising crime are sounded (even falsely), Americans retreat from their willingness to live up to the promises of the Fourth Amendment.¹⁵⁸

Still, Americans are promised some form of Fourth Amendment protection and until now, that protection has been in the form of the exclusionary rule. But “the exclusionary rule simply does not work . . .”¹⁵⁹ In fact, more so than an adversarial warrant proceeding, the exclusionary rule lets the guilty walk. In a scathing analysis of the exclusionary rule, Akhil Amar noted: “[W]hether the cops punched me in the nose is almost never analytically—or even causally—linked to whether they found evidence in my house. Exclusion would thus achieve the right amount of overall deterrence only by the wildest of coincidences”¹⁶⁰

When the judiciary reviews police behavior after the fact—especially this current right wing, “law and order” judiciary—it mini-

155. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 916–17, 938 (1991) (“[F]ighting perjury turns out to be harder still. Even if a warrant is required, an officer who is willing to lie can always create a fictitious informant, and thereby evade the magistrate’s review altogether.”).

156. In fact, the whole purpose of the exclusionary rule is to induce police to behave constitutionally to avoid letting guilty men walk. H. Mitchell Caldwell, *Fixing the Constable’s Blunder: Can One Trial Judge In One County In One State Nudge a Nation Beyond The Exclusionary Rule?*, 2006 BYU L. REV. 1, 64 (2006).

157. See, e.g., Bar-Gill & Friedman, *supra* note 17, at 1652.

158. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 308–09 (1993).

159. Amar, *supra* note 113, at 1137–38 (1996).

160. *Id.* at 1137–38 (citations omitted).

mizes police misconduct in favor of locking up ‘the criminal.’¹⁶¹ Amar’s analysis continues: “[i]f all searches really do require warrants and probable cause, judges will strain to deny that some intrusions really are ‘searches’ [W]e may drive interrogation underground into far more potentially abusive fora; we will also encourage surprise searches, sting operations, and other serious intrusions.” We have already seen this play out as our trial system shifts into a system of pleas. Amar predicts the exclusionary rule will only make that worse. “[I]f doctrine creates an overly intricate matrix of trial rights, the government may react by trying to hold fewer trials, thereby forcing defendants into harsher plea bargains.”¹⁶²

Amar proceeds to advocate against *ex ante* warrant protections, but his argument provides an explanation of why *ex post* solutions to the warrant crisis are equally ineffective.¹⁶³ In the colonial era, the “*ex post* success of a search rendered it reasonable despite the lack of *ex ante* justification.”¹⁶⁴ Under the guise of originalism, a court—perhaps the Supreme Court—could easily return to this view of reasonableness as to any search that results in the finding of some contraband. Originalism notwithstanding, any after-the-fact calculation of probable cause will always be tainted by what the search or seizure found.

Though Amar advocates for *ex post* damage awards for those who have had their Fourth Amendment rights trampled, the very dangers he warns about will present themselves in an *ex post* damages hearing.¹⁶⁵ Courts are incredibly reluctant to find police even civilly liable for their wrongdoings.¹⁶⁶ Still, Amar’s criticisms of *ex ante* protections are not

161. *Id.* (“The exclusionary rule tempts judges to deny that Fourth Amendment violations occurred.”).

162. *Id.* at 1138.

163. For a critique of Amar’s imperfect analysis of Fourth Amendment (and constitutional criminal procedure) issues, see generally Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQUIRY 533 (1999).

164. *Id.* at 543–44.

165. Notably, Amar is much more concerned with the rights of the “innocent.” This dangerous thinking ignores the fact that ‘criminals’ are equally entitled to Constitutional rights and that almost every American has at some time broken the law. Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, BLOOMBERG (Dec. 4, 2014, 10:56 AM) <https://www.bloomberg.com/opinion/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner> [<https://perma.cc/S6TN-XY62>] (“[M]ore than 70 percent of American adults have committed a crime that could lead to imprisonment.”). Police merely catch certain classes of individuals—those who are over-policed—more. *Id.*

166. See, e.g., David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1247 & n.308 (2005); Richard H. McAdams, *Close Enough for Government Work? Heien’s Less-Than-Reasonable Mistake of the Rule of Law*, 2015 SUP. CT. REV. 147, 156–57 & n.157 (2015); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008).

meritless.¹⁶⁷ A WC addresses all of the above concerns (fear of the ‘guilty’ walking free and the flaws of existing *ex ante* and *ex post* Fourth Amendment protections).

A WC does not alter the burden of proof necessary to justify a search or seizure. Instead, its role is to ensure that burden is properly met. Probable cause is a relatively low threshold; police should be able to meet the burden relatively easily, even where an adversary argues that they have not.¹⁶⁸ *Leon* has allowed police to execute warrants without fear of exclusion where probable cause did not exist because the Supreme Court so despised losing otherwise valid evidence.¹⁶⁹ In so doing, *Leon* has eviscerated the Reasonableness Clause. Instead of having to read an entire clause out of the Constitution, a WC would ensure that probable cause has been met without the threat of “letting the guilty walk.” If a WC succeeds, police can always try again; there is no double jeopardy on warrants.¹⁷⁰ So, even if the WC successfully advocated for a guilty person’s rights, it was a failure of the police, not the system, that the warrant was not granted. Police can then very easily rectify that situation by investigating further. This does not mean that the exclusionary rule should be done away with in cases of police misconduct, but a WC would limit the need for exclusion because fewer individuals would be wrongfully searched or seized. *Leon* should be overturned. Even where a WC argues that probable cause does not exist, if a judge still wrongly rules that it does, the evidence resulting from that search should be excluded.

167. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 4 (1994) (“Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy....”) (quoting Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758–59, 798 (1994)); *id.* (“[C]ivil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy’ will repair the harm caused by police illegality. Civil damage actions are ‘deeply rooted in our Fourth Amendment tradition whereas criminal exclusion is wholly unprecedented.’”).

168. That police so often fail to meet the probable cause standard demonstrates exactly why we need a WC, particularly when police are comfortable ignoring this bar. Bar-Gill & Friedman, *supra* note 17, at 1651–52. They “testilie” (a portmanteau of testify and lie) and magistrates are reluctant to refuse police requests. VAN DUIZEND ET AL., *supra* note 35, at 36.

169. *United States v. Leon*, 468 U.S. 897, 913 (1984) (“[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution’s case in chief.”).

170. Tellingly, the Federal Rules of Criminal Procedure do not even mention the possibility of rejecting a warrant. Instead, they state a magistrate “must issue the warrant if there is probable cause.” FED. R. CRIM. P. 41; *see also* FED. R. CRIM. P. 4 (stating the same for arrest warrants). Thus, even if an officer repeatedly brings the same request for warrant, the magistrate must grant that warrant if and when the officer finally establishes probable cause.

An adversarial warrant proceeding ensures that an adversarial action occurs *before* any person (police, prosecutor, judge, or defender) knows how the search would turn out. Thus, we need not worry about the judiciary's recalcitrance to punish police misconduct by letting the guilty walk. Before a search, there is every reason to think the person targeted by police is innocent—thus, judges need not be asked to perform an after-the-fact evaluation of whether a search was wrong when the search turned up evidence of guilt. Warrant proceedings would also be discrete, so magistrates can adhere to the Constitution by denying police requests without being labeled “soft on crime” or “anti-police.”

E. Concerns From Police Critics

It must be noted that police misconduct would still occur outside of warranted searches. Short of dismantling the police system, police would still use excessive force. And when they do, few remedies can be had besides *ex post* civil suits for damages and police discipline. Regardless, when police invade a home without cause, those *ex post* hearings would often be ineffective. Only an adversarial warrant proceeding can avoid these harms before they occur.

While this proposal addresses an important source of police misconduct, it does not address other aspects of policing that seriously disturb American liberty. For example, adoption of this proposal would likely not have prevented George Floyd's death—the warrant for his arrest was valid and based on actual probable cause. This proposal cannot perfect policing, end police brutality, or completely end minor police misconduct. Where new rules are imposed on police to limit their authority, police are quick to find exceptions and make workarounds.¹⁷¹ Ever threatening to eviscerate the warrant clause, for one example, is the consent search.¹⁷² Short of abolishing the consent search (or the police) there is little this author can imagine that would minimize the deep impact of consent searches on police intrusions and petty arrests.¹⁷³

171. See Robert Klemko & John Sullivan, *The Push to Remake Policing Takes Decades, Only to Begin Again*, WASH. POST (June 10, 2021) <https://www.washingtonpost.com/investigations/interactive/2021/police-reform-failure/> [perma.cc/8K5C-MMCT].

172. This Note is reluctant to use the term ‘consent’ because little resembles consent in the context of police searches. See Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774–75, 800–01 (2005).

173. Some argue that police should be required to inform individuals that they can deny a police officer's request for consent. See, e.g., Journal of Law Reform, *Episode 8 – Professor Roseanna Sommers on Consent, Psychology, and the Law* (Mar. 28, 2022), <https://open.spotify.com/episode>

All of this is to say that police already enjoy significant power to utilize warrant exceptions and, through those exceptions, over-police. That is why this Note has advocated for more stringent warrant requirements to accompany the WC. Still, any reform is better than no reform. Even if police continue to exploit loopholes, a WC would prevent police misconduct in at least some cases.

An idea that has gained traction specifically on the left, yet is relatively popular in the United States, is independent community oversight of the police.¹⁷⁴ An adversarial warrant proceeding is more functional, and certainly more proactive, than post-hoc community oversight, which oversees police *after* they commit a violation. In fact, an adversary designed to restrict the ability of police to violate rights or commit wrongdoings would achieve the same ends as police oversight, but more effectively and efficiently. Rather than wait for a police officer to submit an invalid warrant to a judge (which an oversight board might not even recognize as a harm it is designed to redress or prevent from recurring) a WC would act as an oversight authority on the police to prevent them from ever violating an individual's rights by wrongful search or seizure in the first instance. Thus, while more should be done to temper police power, WCs are at least as effective as other more common policy recommendations from police critics.

CONCLUSION

In an adversarial system, protection is afforded not just to the People, but to the facts. Where evidence and testimony are easily falsified or stretched, gatekeepers specializing in ferreting out those untruths are the best guards we have against injustice. Justice Stevens, quoting Justice Burger, wrote, "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."¹⁷⁵

/oJTouZH292QheGVxaqYvMg?si=QDcUyYcZS92IK1deFLjIkg [https://perma.cc/2JKX-S8DS]. This reform may reduce the number of consent searches performed, but probably only minimally. Advising a person of their right to refuse a request does not make them feel freer to refuse. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 2000 (2019).

174. See, e.g., *Community Oversight Paves the Road to Police Accountability*, NAT'L ASSOC. FOR CIVILIAN OVERSIGHT OF L. ENF'T, https://www.nacole.org/community_oversight_paves_the_road_to_police_accountability (last visited Apr. 19, 2022) [https://perma.cc/UBH2-NGZU].

175. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974) (Burger, C.J.)).

The adversary system has long been hailed as the best way to uncover the truth and ensure justice. Justice Stevens went on, “[w]e have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.”¹⁷⁶ In many ways, the adversarial nature of criminal prosecution is unraveling through limiting the power of defendants, providing more discretion to prosecutors, and shifting to a focus on plea-bargaining over trials. But even before prosecution begins in earnest, the State can impose substantial and disastrous burdens on an individual through the execution of a search or arrest warrant. In order to ensure that citizens do not suffer unreasonable searches and seizures, we must protect individuals from unlawful warrants executed on them *before* the warrant is even granted.

The best way to do that is to push back against the investigator seeking a warrant and scrutinize their narrative. Where magistrates and the courts have failed to do so, Congress must create an independent advocate who would fight for an individual’s rights against a violation of their property and bodily autonomy and ensure the magistrate remains neutral. Congress must create a WC who would serve in every warrant-granting court to defend the Fourth Amendment rights of citizens.

176. *Id.* at 408–09.